Before the
Federal Communications Commission
Washington D.C. 20554

In the Matter of	)	
	)	
Telecommunications Relay Services	)	
And Speech-to-Speech Services for	)	CC Docket No. 98-67
Individuals with Hearing and Speech	)	
Disabilities	)	
	)	

APPLICATION FOR REVIEW BY
COMMUNICATION SERVICE FOR THE DEAF

Communication Services for the Deaf, Inc.
102 North Krohn Place
Sioux Falls, SD 57103
605-367-5760

By: Karen Peltz Strauss
KPS Consulting
2120 L Street, N.W.
Washington, D.C. 20037
(202) 478-6148

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SUMMARY

CSD seeks reversal of CGB's June 2004 Rate Order and the restoration of the $8.854 compensation rate set for VRS by the Federal Communications Commission (FCC) in its June 10, 2004 Report and Order, pending resolution of the VRS cost methodology and quality issues raised in the Commission's further notice of proposed rulemaking (FNPRM) accompanying that order. Although CGB suggests that the current rate is intended to achieve compensation for reasonable VRS costs, there is no way for the FCC to confirm that this is the case without receiving the additional information on an appropriate cost methodology requested in the FNPRM. Nor is there any way for the Bureau to conclude that the present rate meets the legal requirement of functional equivalency without further input from the public. In fact, all evidence received by the FCC to date leads to the opposite conclusion, *i.e.,* that the newly adopted rate provides neither reasonable compensation nor adequate funding to meet the telecommunications needs of people who use relay services.

CGB's June 2004 Rate Order is based on several assumptions about relay services that ignore relay history and Congress's intent to ensure that these services fully meet the telephone accessibility needs of people who are deaf and hard of hearing. First, CGB suggests that the VRS rate is not linked to VRS quality, an assumption that ignores the receipt of over 1,000 consumer comments to the contrary, as well as the history of relay service experience in this country. Second, CGB maintains that the interim rate reduction implemented in 2003-04 failed to hurt VRS quality because VRS "flourished" during this period. In fact, although VRS call volume rose dramatically over the past year, such growth evidences not an acceptable compensation rate, but rather the growing reliance on

these services because they offer – despite their deterioration – the *only* means of having real time, natural flowing conversations with and by people who use sign language. Moreover, the Bureau's suggestion that the deterioration in relay service quality was simply caused by greater demands for the service fails to recognize that the expenses associated with meeting those demands were not met by the original rate of $7.75 and cannot be met by the new rate of $7.29 set for 2004-05.

Finally, CGB's assumption that the Commission can apply a different standard of functional equivalency for VRS simply because it is not yet mandated by the Commission belies Congressional intent to ensure functionally equivalent relay services under Title IV of the ADA regardless of their cost. Although CSD agrees that compensation for VRS should be reasonable, Congress did not place an upper funding limit on the provision of telecommunications relay services, and – unlike other titles of the ADA – did not incorporate an undue burden standard into Title IV's mandate for these services. VRS is in fact already mandated – by Congress – as it is this service and this service alone that can fulfill Congress's directives to (1) end telephone discrimination against deaf and hard of hearing people who were not served or were under-served by traditional TRS, and (2) provide universal service to all Americans. That the FCC has not yet mandated this service in its own rules, is not sufficient reason to disallow costs associated with attempts by providers to make this service as effective as possible for the American public. Moreover, CGB's decision not to allow research and development costs associated with VRS ignores a clear and absolute Congressional directive for the FCC to take steps to encourage new relay technologies that can bring these services closer to achieving Congress's goal of functional equivalency.

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APPLICATION FOR REVIEW OF
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I. Introduction

Pursuant to Section 1.115 of the Commission's rules,[1] Communication Service for the Deaf, Inc. (CSD) hereby submits an Application for Review of the Consumer and Governmental Affairs' (CGB's) TRS June 2004 Rate Order (2004 Rate Order), DA 04-1999, released on June 30, 2004.[2] This Order reduces, on an interim basis, the compensation rate for video relay services (VRS) to $7.293 per minute, as proposed by the National Exchange Carriers Association (NECA) on May 3, 2004. CSD seeks reversal of CGB's decision, and the restoration of the $8.854 compensation rate set for these services by the Federal Communications Commission (FCC) in its June 10, 2004 Report and Order, pending further review of the cost methodology and quality issues related to VRS that are raised in the Commission's further notice of proposed rulemaking (FNPRM) accompanying that order.[3] CSD recognizes that the interim $7.293

[1] 47 C.F.R §1.115.
[2] *In the Matter of Telecommunications Relay Services and Speech to Speech Services for Individuals with Hearing and Speech Disabilities*, Order, Dkt. 98-67, DA 04-1999 (rel. June 30, 2004) (CGB 2004 Rate Order).
[3] *In the Matter of Telecommunications Relay Services and Speech to Speech Services for Individuals with Hearing and Speech Disabilities,* Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, CC Dockets No. 90-571, 98-67, 03-123*,* FCC 04-137 (rel. June 30, 2004 ("*2004*

rate may be adjusted upward after providers submit supplemental information relating to capital investment and any challenges to cost disallowances.[4] Nevertheless, CSD brings this application for review because it is concerned that the Bureau's legal justifications for approving the NECA rate at this point in time are both flawed and in violation of Congressional intent. In any event, CSD does not see how CGB can determine that the current rate provides compensation for reasonable VRS costs or meets Congressional intent under Title IV of the Americans with Disabilities Act (ADA) without receiving the additional information requested in the FNPRM.

Through its relationship with Sprint, CSD serves as a provider of VRS throughout all fifty states and the United States territories. CSD has been an active participant of the FCC's proceedings on video relay services, and over the past year has expressed repeated concern – both in formal submissions and meetings with the Commission – about the impact that the FCC's actions on this issue are having on the ability of consumers to receive functionally equivalent relay services mandated by the ADA.

II. The Bureau's Order is Based on Flawed Assumptions

CGB's Order approving reduction of the VRS rate is premised on several assumptions, all of which ignore historical fact and confuse the issues at hand. These assumptions are (1) that the compensation rate is not related to VRS quality; (2) that last year's reduction in VRS rate did not hurt the provision of VRS because VRS has

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TRS Report & Order"). These quality issues address, among other things, whether VRS should become a 24 hour, 7 day a week mandated service with a minimum answer speed.

[4] CGB's June 2003 Interim Rate Order had directed NECA to apply a 11.25% rate of return on investment when it determined the VRS compensation rate for the following year. However, NECA failed to include this in its May 3rd calculations because it had not collected sufficient data on the providers' capital investment. Despite this error in NECA's proposed rates, CGB approved NECA's these rates, and at the same time informed providers that they may submit supplemental cost data reflecting their capital investment for each form of TRS. The Bureau has indicated that it may change the VRS rate based on this additional data. CGB 2004 Rate Order at ¶¶ 34, 47, 50.

flourished, and (3) that the FCC is permitted to apply a different standard of functional equivalency for VRS simply because this service is not yet mandated by the Commission. Each of these are discussed below. Errors contained in the reasoning behind each of these assumptions provide more than sufficient basis to rescind the present rate order and to restore the $8.854 VRS compensation rate set in the FCC's June 2004 Report and Order, pending resolution of the VRS cost methodology and quality issues raised in FNPRM accompanying that order.

A. Assumption Number 1: The Compensation Rate is Not Related to VRS Quality

CGB states that the purpose of its June 2004 Rate Order is to approve or modify the NECA rate that compensates providers for their reasonable costs in compliance with non-waived mandatory minimum standards, and that "commenters' concerns directed at quality of service issues are not relevant here."[5] In this vein, the Bureau disregards well over 1,000 comments (including reply and late filed comments) submitted by consumers and consumer groups urging the FCC not to take action that would hurt the quality of VRS. These consumers wrote of the enormous benefits of VRS, including the ability to finally be able to converse in one's natural language, to be able to use the telephone to effectively perform job functions to improve their employability, and to enjoy what has been taken for granted by the rest of society for so long – the ability to simply communicate by telephone in real-time with anyone and any institution, including banks, transportation authorities, and governmental office that use interactive phone response systems. Some even explained that prior to VRS, they were unable to make any phone calls at all, either because of the physical inability to type (e.g., because of arthritic conditions) or because they were too young or to old. The reason that over 1,000

[5] CGB Rate Order at ¶46.

consumers took the time to figure out how to file comments with the FCC, an agency with which most have never had contact, is because the telecommunications access that these individuals can now enjoy through VRS is coming to play a monumental role in their lives. By any standard, the proportion of deaf individuals who made the effort to plead their case to the Commission is voluminous. Yet rather than even attempt to examine the extent to which compensation for VRS might impact the needs of these individuals, CGB's 2004 Rate Order summarily dismisses their concerns as inappropriate for this proceeding.

It is somewhat perplexing how CGB can yet again conclude that rate has nothing to do with quality when the direct consequence of its 2003 reduction in the VRS compensation rate caused an across-the-board reduction in VRS hours and days of operation, and a near across-the-board increase in VRS waiting times. Prior to the first rate reduction, CSD had been providing VRS 24 hours a day, 7 days a week, with answer speeds that met the FCC's standards for traditional TRS. When the rate was reduced, CSD had no choice but to drastically cut hours and days of operation. And while CSD continues to make every effort to achieve answer speeds that parallel the agency's mandates for text-to-voice relay, repeated consumer complaints about long waiting times indicate that the lower rate has caused at least some other providers to increase their answer speeds to levels that far exceed a standard of functionally equivalency.

As CSD noted in its comments on the proposed NECA rate,[6] the shortened hours and higher blockage rates now characteristic of VRS are reminiscent of the inferior relay services that inadequate funding forced states and private entities to provide back in the 1970s and 1980s. In fact, a close look at relay history reveals that funding for relay

[6] CSD comments filed on May 24, 2004.

services is not only relevant to relay quality; the two are integrally related. Throughout the 70s and 80s, privately-run relay centers, staffed by thousands of volunteers, opened all over the country. Virtually all faced severe funding limitations that strained their ability to meet the growing need for telecommunications in the deaf community. Severely restricted hours and meager staffing caused thousands of calls to go unanswered on any given day. Many of the relay services also imposed severe restrictions on the hours, days and content of calls that could be made. The inordinately high demand for relay access, coupled with an interest in having full, not partial, telecommunications access, fueled a growing consumer movement to obtain comprehensive statewide relay services across the country. But while many of the state programs, once instituted, did offer an improvement over their non-profit predecessors, inadequate funding still prevented nearly all these programs from fully meeting the demands of the deaf community. States frequently funded their relay programs with governmental appropriations that grossly underestimated the voluminous demand for telephone relay access. And even those states that funded their systems with subscriber surcharges frequently imposed caps on those surcharges, again impeding the adequate delivery of these services.

The case of California's Relay Service (CRS) is illustrative. When CRS began taking calls on January 1, 1987, it expected to handle 50,000 calls. But in its first month of operations, CRS in fact handled 87,000 calls. Within two years, this number jumped to more than 250,000 calls each month. Unfortunately, California's legislature had placed a cap on the allowable surcharge that could be placed on California subscriber telephone bills. When relay demand began to skyrocket, the state's relay services came into jeopardy, and consumers were forced to return to their legislators to request an increase in the surcharge cap just to keep the system up and running. While California's legislature was willing to increase its funding limit to save its relay program, other states were not as generous; where relay program budgets fell short of meeting consumer demand, deaf consumers paid the consequence.

In order to conserve funds, many of the states that initiated relay programs in the 1980s imposed severe restrictions on their early relay services.[7] As is now true for VRS, some states limited the times of day open for relay business.[8] Other states placed time limits on the calls themselves.[9] Still other state relay programs restricted the number of relay calls permitted by any one relay caller.[10] And a great number of states failed to impose any standards at all for relay service quality. Weak typing and grammar skills, coupled with a lack of familiarity with the communication needs of relay users, often presented users with inferior services.

By far, however, the biggest difficulty confronting these early relay programs was their inability to adequately handle large volumes of relay calls. Insufficient funding meant that callers typically had to endure endless busy signals and long queues before reaching a relay operator. For consumers who lived through these difficult times, what is occurring today with respect to the limitations placed on VRS funding is strikingly – and

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[7] Summary of State Dual Party Relay Services, National Center for Law and Deafness (NCLD) (July 1989, 1990).

[8] For example the relay service in Kansas operated only from 8:00 a.m. to 5:00 p.m. Monday through Friday, and not at all on holidays or weekends. Virginia's service was a bit better, but still only accepted calls from 7:30 a.m. to 7:30 p.m.

[9] Massachusetts and Vermont, for example, restricted the length of each call to ten minutes for personal calls and twenty minutes for business calls. Arkansas similarly limited calls to fifteen minutes and prohibited personal or "chatty" calls.

[10] For example, New Hampshire imposed a five call per day limit for calls up to fifteen minutes each. Similarly, Nebraska, Minnesota, and Arkansas permitted their relay operators to restrict the number of calls made by individuals each time they dialed into their centers.

far too painfully – similar to the denial of access that occurred back during these early days of state relay programs. Anyone who bore witness to these early programs can readily attest that adequate relay funding has *everything* to do with ensuring adequate relay quality.

When Congress enacted Title IV of the ADA, its intention was to eliminate the disparity among state programs, so that consumers would no longer have to put up with the restrictions that existed in programs that were under-funded. The Senate Committee explained: ". . . [T]he [state] systems that do exist vary greatly in quality and accessibility. The Committee finds that to ensure universal service to this population of users, service must be made uniformly accessible on a local, intrastate, and interstate basis. . . It is essential to this population's well-being, self-sufficiency and full integration into society to be able to access the telecommunications network and place calls nationwide without regard to geographic location."[11] The Committee went on to note that "attaining meaningful universal service for this population also requires that some level of minimum federal standards for service, service quality, and functional equivalency to voice telephone services be established and maintained."[12]

As before, limited funding is seriously impairing the ability of relay services to meet the communication needs of people who are deaf and hard of hearing. In the interest of not having this aspect of history repeat itself, over a thousand consumers, representing millions more, have come forward to assert their right to functionally equivalent VRS. To conclude that restricted VRS funding has no impact on the quality of

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[11] S. Rep. No. 116, 101st Cong., 1st Sess. 79 (1989).
[12] *Id.*

these services is not only incorrect, it runs counter to the mountain of evidence compiled in the TRS docket as well as twenty years of relay history.

B. Assumption Number 2: There is No Evidence That Last Year's Reduction in VRS Rate Hurt the Provision of VRS Because "VRS has Flourished."

CGB assumes that the significant increase in VRS call volumes over the past year somehow provides evidence that the lower compensation rate for these services has not adversely affected VRS quality. Indeed, CGB takes this reasoning a step further, to suggest that the very reason for the deterioration of VRS – i.e., the longer waiting times – was not caused by insufficient funding, but rather was itself the result of an increase in call volume. The Commission should again consult relay history to understand that this circular reasoning cannot withstand scrutiny.

In 1969, a deaf man named Paul Taylor arranged for twenty deaf families in St. Louis to pay $2.00 a month to a family-run service for the ability to make relay calls to and from voice telephone users. The service by today's standards was quite limited. Despite this fact, demand for its services far exceeded the fiscal ability of its customers to sustain its operations, and the service closed after a mere six months.

When private and state relay programs began to proliferate in the 1980s, populations previously unable to communicate by telephone responded to these programs with extraordinary enthusiasm. They did so despite the severe restrictions imposed on these early programs, as discussed above.[13] The growth that occurred in California's relay program has already been noted. Similarly, New York's relay program handled approximately 45,000 calls during its first month of service in 1987, but as many as

[13] Annual surveys compiled by the National Center for Law and Deafness at Gallaudet documented the steady increase in relay volumes despite the shortcomings of these services. See Summary of State Dual Party Relay Services, NCLD (Prepared annually from 1987 through 1992).

100,000 calls by May of 1989. So great was the demand for TRS across the country *despite its limitations* that even AT&T went to Congress to request legislative action for a nationwide relay system. In testimony before the U.S. Senate on May 10, 1989, Gerald Hines of AT&T called upon the Legislature to require coordinated efforts among state and federal governmental authorities that would expedite the provision of relay services, noting that the need for these services "greatly outstrip[ped]" the resources.

As was true when text-to-speech relay technology was first introduced, the introduction of VRS has excited deaf consumers who are eager to try out a technology that can significantly improve their communications with the rest of the world. But while VRS call volume has soared, the immense number of comments submitted to the Commission over the past several months urging improvements in VRS hardly suggest that VRS quality has "flourished" despite the reduction in rate. Put simply, the growth in relay volume has come about because many deaf individuals who were unable to type or who were frustrated by the limitations of traditional TRS, can now make real-time phone calls in their native or preferred language for the first time in their lives. Greater use of VRS has occurred because deaf individuals are discovering the incredible benefits that VRS can offer – more natural interpersonal communications, increased job opportunities, increased access to IVR systems, conference calling, and a multitude of other applications. If anything, the growth in VRS volume that these benefits have caused provides evidence not of a rate that is sufficient, but rather of a growing reliance on these services by the deaf and hard of hearing community *despite* the restrictions caused by this rate. But just as the consumers who had flocked to the early relay programs in the 1980s quickly grew tired of the restrictions these programs imposed, so too are consumers in the new millennium growing increasingly frustrated with the funding limitations that are impeding their use of VRS. As the agency charged with overseeing the Interstate TRS Fund, the FCC should have an interest in ensuring that the monies flowing from that fund be used to support VRS that effectively and fully meet the needs of this community.

C. Assumption Number 3: The FCC is Permitted to Apply a Different Standard of Functional Equivalency for VRS Simply Because this Service is Not Yet Mandated by the Agency.

CGB suggests that because VRS is not a mandated service, providers are not entitled to be compensated for their efforts to provide functionally equivalent telephone service through the provision of VRS. In this regard, CGB states that "providers are not entitled to unlimited financing from the Interstate TRS Fund to enable them to further develop a service that is not even required, under a statute that requires providers to offer TRS as an accommodation for persons with certain disabilities."[14] CGB uses this justification, for example, to reject compensation for engineering and research and development expenses that could improve VRS beyond the non-waived mandatory minimum TRS standards.

The problem with this approach is that it incorrectly assumes both that the FCC can arbitrarily set different standards for functional equivalency for different relay technologies, and that VRS is not a relay service whose functional equivalence is required by the ADA. The standard of functional equivalency as adopted in the ADA is an absolute standard. Its goal is to achieve a telephone service that permits communication between deaf, hard of hearing and speech disabled individuals and other individuals in a manner that approximates, as closely as possible, telephone

[14] CGB 2004 Rate Order ¶31 n. 84.

communication between conventional voice telephone users.[15] There is no better testament to the ability of VRS to achieve functional equivalency than the consumer comments filed in this docket. Because it is VRS and VRS alone which is needed to offer functional equivalency for millions of deaf and hard of hearing Americans who are coming to rely on this service as their primary means of telephone communication, the ADA does not merely allow, but rather dictates the provision of this service. It follows that the FCC, as the overseer of the Interstate TRS Fund and the regulator of TRS, cannot simply choose not to require this service in a manner that promotes equality of telephone service to the greatest extent possible. Rather, the FCC has an obligation, under the ADA, to ensure a compensation scheme that fosters the provision of VRS in a manner that fulfills this functional equivalency mandate.

CSD understands that the FCC will be examining more closely just what is needed to provide high quality VRS through its FPRM. However, the Commission has enough information before it now to conclude that its current funding authorization is insufficient to achieve a video relay service that approximates functional equivalency. The Commission has already increased the VRS compensation rate retroactively for part of the 2003-04 TRS fiscal year. All that CSD asks is that this rate be restored pending the FCC's proceeding on VRS quality, a result that is necessitated by the fact that last year's rate of $7.75 did not, and certainly the new rate of $7.293 cannot, ensure the provision of acceptable video relay services. Again, this is evidenced by the

[15] The Senate Committee approving Title IV of the ADA explained: "The Committee intends that section 255 better serve to incorporate the hearing- and speech-impaired communities into the telecommunications mainstream by requiring that telephone services be provided to hearing and/or speech impaired individuals in a manner that is functionally equivalent to telephone services offered to those who do not have these impairments. This requirement will serve to bridge the gap between the communications impaired telephone and the community at large. To participate actively in society, one must have the ability to call friends, family, businesses, and employers." S. Rep. No. 116 at 78.

extraordinary outcry from consumers who, over the past year, have complained of deterioration in VRS quality.

Contrary to CGB's statements, unlike the reasonable accommodations required in Titles II and III of the ADA, nothing in Title IV refers to relay services as "an accommodation" *for* a particular population. Rather, Title IV's mandates, directed at our nation's telephone companies, is to facilitate telephone communication *between and among* various populations that were previously unable to use this medium to communicate with one another. As such, it was Congress's intent to mainstream TRS into the provision of telephone services; indeed, early on, Congress, like the FCC, drew frequent comparisons between the provision of rural telephone services and the provision of relay services.[16] Like TRS, telephone companies are forced to incur greater expenses to provide rural telephone services – in the latter case because these service areas are located further from central switching facilities. But just as there has never been an upper monetary limit imposed on the provision of rural services, Congress has never qualified the provision of relay services with an upper funding cap.

On the contrary, Congress made clear that telephone companies, in providing relay services, must do what is necessary to achieve universal telephone service for all Americans. To this end, Congress incorporated the universal service obligation right into

[16] See e.g., *Access to Telecommunications Equipment and Services by the Hearing Impaired and Other Disabled Persons*, Order Completing Inquiry and Providing Further Notice of Proposed Rulemaking, CC Dkt. No. 87-124, FCC 89-242, 4 FCC Rcd. 6214 (adopted July 21, 1989, rel. July 27, 1989). In this proceeding, the very first in which the FCC decided to mandate relay services (interstate only), the Commission decided that the costs of providing these services should be recovered from the broad base of interstate service subscribers who would benefit from the increased utility of the overall network. As justification for not imposing relay costs solely on TTY users, the FCC relied on national policy not to charge rural subscribers in high cost service areas more than nationwide average telephone rates, citing the D.C. Circuit Court of Appeals' decision in Rural Telephone Coalition v. FCC, 838 F. 2d 1307 (D.C. Cir. 1988). Just as the Commission would not consider limiting funding for rural telephone customers, nor did it give any thought to limiting funding for interstate relay customers; the costs of providing service to both types of customers would be broadly spread over the American subscriber base.

the mandates for relay services: "In order to carry out the purposes established under section 1, to make available to all individuals in the United States a rapid, efficient nationwide communication service . . . the Commission shall ensure that interstate and intrastate telecommunications relay services are available, to the extent possible and in the most efficient manner, to hearing-impaired and speech-impaired individuals in the United States." Indeed, it is telling that the undue burden language found in all of the other ADA titles covering employment, places of state and local governments, and places of public accommodation, was left out of Title IV's relay mandates.[17] Congress's intent was unambiguous: telephone companies were required to provide functionally equivalent TRS, period. No qualifications or defenses would be permitted to compromise this unconditional directive.

III. Title IV of the ADA Mandates the FCC to Encourage New Relay Technologies.

Not only did Congress make the mandate for functionally equivalent relay services absolute; it went even further to direct the FCC to promulgate regulations that encourage "the use of existing technology and do not discourage or impair the development of improved technology.[18] The Senate Committee responsible for approving Title IV of the ADA could not have been clearer in its intent *not* to limit relay services to the single telephone technology that was available fourteen years ago, when the ADA was enacted:

> Current technology allows for communications between a TDD user and a voice telephone user by employing a type of relay system. . . . Although the Committee notes that relay systems represent the current state-of-the-art, this legislation is not intended to discourage innovation regarding telecommunications services to individuals with hearing and speech impairments. The hearing- and speech-

[17] Title I refers to undue hardship, rather than undue burden; however the factors that constitute both of these defenses are nearly identical.
[18] 47 U.S.C. §225(d)(2).

> impaired communities should be allowed to benefit from advancing technology. As such, the provisions of this section do not seek to entrench current technology but rather to allow for new, more advanced, and more efficient technology.[19]

Restricting VRS funding to only the mandated TRS standards and denying any and all compensation for research and development flies in the face of this Congressional directive. VRS has proven itself to be the advanced technology of choice amongst individuals who use American sign language, a technology that once and for all allows these individuals to begin to enjoy the type of telephone communications that the rest of society has enjoyed for more than a century. Actions – such as the June 2004 Rate Order – that hurt the functional equivalency of this service and impede efforts to improve its efficacy conflict with legislative intent to end telecommunications discrimination against deaf and hard of hearing people. Such actions also conflict with the Commission's own efforts to facilitate and expand broadband services. While CSD agrees that reimbursable VRS costs should be "fair" and "reasonable," it does not understand how CGB can arrive at a definition of reasonableness that excludes all research and development costs intended to improve a service that is funded by all telephone subscribers. Nor does it understand why the FCC would want to authorize payment for anything less than a fully effective and functionally equivalent telephone service. The present funding scheme offers virtually no flexibility nor incentive to research new technologies that can provide improved service features to VRS users, features that would facilitate access to telecommunications, expand VRS applications, and even improve cost efficiencies.

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[19] S. Rep. No. 116 at 78. Later in the Report, the Senate Committee emphasized that the minimum federal standards used to govern the provision of TRS "should not have the effect of freezing technology or thwarting the introduction of a superior or more efficient technology." *Id.* at 80. In addition, as noted in CSD's comments on the NECA proposed rates, one of CGB's own delegated functions similarly directs the Bureau to propose policies that "support the Commission's goal of increasing accessibility of communications and technologies for persons with disabilities." 47 C.F.R. §0.141(f).

The failure to allow reimbursement for R&D expenses also impedes the ability of VRS providers to explore solutions to currently waived minimum standards so that these waivers can be eliminated in the future, a result in direct contravention of the FCC's own rules which have previously defined such standards to constitute functional equivalency. All too often, the disability community has witnessed, first hand, the consequences of having to rely on technology that does not keep up with technological advances enjoyed by other Americans. As the telecommunications industry surges ahead in producing broadband technologies that are designed to significantly enhance communication for all Americans, people who are deaf and hard of hearing should not once again be left behind. Unfortunately, by eliminating reimbursement for any R&D whatsoever and cutting the VRS compensation rate to such an extent that providers need every penny merely to stay alive in the industry, the FCC has made it nearly impossible for providers to invest in new technologies to ensure the continued modernization of VRS that can meet the mobility, emergency, and other needs of VRS users. Providers who do attempt to improve VRS are penalized because it costs more to develop improvements to achieve functional equivalency than they can receive back from the Interstate Fund.

IV. **The Compensation Rate Set by the June 30, 2004 Report and Order Should Apply While the FCC Establishes VRS Guidelines**

As noted earlier, the FCC has teed up the issue of improving VRS in the further notice of proposed rulemaking accompanying its June 2004 Report and Order. In addition, the FNPRM offers considerable opportunity to provide the Commission with feedback on an appropriate VRS compensation rate and cost methodology. CSD very much appreciates the opportunity to provide the Commission with input on these issues. However, the very fact that these issues are now coming under the Commission's review evidences the need to sustain the current rate of $8.85 per minute pending the completion of this review. The wheels of bureaucracy turn slowly; resolving the quality and compensation issues raised in the FNPRM will likely take a long time. It took a full year just to release the retroactive rate order for TRS fiscal year 2003-04; deciding issues of VRS quality could take even longer.[20] Until those issues are resolved, it is both unfair and contrary to Congressional intent to set a rate that denies consumers functionally equivalent relay services when these services are already technically feasible.

While CSD believes that it is capable of providing near-functionally equivalent relay service if the $8.85 per minute compensation rate remains in effect,[21] it does not believe that the lower rate of $7.293 per minute will accomplish this goal. It is for this reason that CSD requests that the 2003-04 retroactive rate apply to VRS until such time that the Commission has resolved the quality and rate issues raised in the FNPRM. Any other outcome will cause further restrictions to be imposed on the quality and availability of VRS, in violation of the ADA's mandates for functionally equivalent telephone service.

V. Conclusion

CGB's conclusion that a reduction in the VRS compensation rate does not have an adverse impact on the quality of VRS is arbitrary and capricious because it ignores voluminous evidence in the record to the contrary. In fact, the restrictions that the present compensation rate will place on video relay services are reminiscent of the

[20] It should be noted that although CGB has offered an opportunity for providers to supplement their data submissions to make up for NECA's failure to collect data on investment, providers still have not been given specific direction about the supplemental data needed to re-adjust the June 2004 rate to properly consider the rate of return on investment. In the interim, providers must struggle to provide VRS at a compensation rate that does not even cover basic expenses.

[21] CGB believes that *full* functional equivalency requires mandating VRS on a 24 hour, 7 day a week basis, and is not prepared at this time to confirm that the $8.854 per minute rate will be sufficient to achieve that goal.

substandard relay services that existed prior to Congress's mandates for functional equivalency in Title IV of the ADA. These restrictions violate Congress's intent to enable people who are deaf and hard of hearing to effectively communicate with other Americans and threaten the independence and other benefits that deaf and hard of hearing people would be able to achieve through VRS were this service properly funded. CSD urges the Commission to rescind CGB's June 2004 rate order and to restore the rate of $8.854 per minute set retroactively for 2003-04 until such time that the Commission resolves the quality and VRS compensation issues presented in the FNPRM accompanying its June 2004 Report and Order. Only by maintaining this rate can the Commission hope to guarantee VRS that approximates the functional equivalency contemplated by Congress in Title IV of the ADA.

Respectfully submitted,

/s/

Ben Soukup, CEO
Communication Service for the Deaf
102 North Krohn Place
Sioux Falls, SD 57103
605-367-5760

Karen Peltz Strauss

By: Karen Peltz Strauss
KPS Consulting
2120 L Street, NW
Suite 400
Washington, D.C. 20037
202-478-6148
kpsconsulting@starpower.net

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